



**Australian Government**

**Insolvency and Trustee Service Australia**

**INSPECTOR-GENERAL  
PRACTICE DIRECTION No 16**

**Debt Agreement Administrators**

**Guidelines relating to  
Administrator's duty to notify  
the Official Receiver of 6 month  
arrears default**

Release Date May 2009

|   |          |
|---|----------|
| <b>INTRODUCTION.....</b>                                      | <b>1</b> |
| <b>PRACTICAL MEANING AND ELEMENTS OF DUTY .....</b>           | <b>1</b> |
| <i>What constitutes a six months arrears default? .....</i>   | <i>1</i> |
| <i>How to measure “6 months”? .....</i>                       | <i>1</i> |
| <i>Notifying the Official Receiver .....</i>                  | <i>1</i> |
| <i>Practical examples .....</i>                               | <i>2</i> |
| <b>CONSEQUENCES IF ADMINISTRATORS BREACH THIS DUTY .....</b>  | <b>4</b> |
| <i>National Personal Insolvency Index and creditors .....</i> | <i>4</i> |
| <i>Administrators .....</i>                                   | <i>4</i> |
| <b>ITSA ROLES.....</b>  | <b>4</b> |
| <i>Bankruptcy Regulation .....</i>                            | <i>4</i> |
| <i>Debt Agreement Service.....</i>                            | <i>5</i> |
| <b>CONCLUSION .....</b>                                       | <b>5</b> |

## Introduction

1. The purpose of this document is to outline the Inspector-General in Bankruptcy's regulatory role, in regard to the principles on which a debt agreement administrator has a duty to notify the Official Receiver (ie ITSA's Debt Agreement Service (DAS)) that a six month arrears default has occurred. It provides details of the expectations of the Inspector-General in respect of this duty including best practice principles. It is complemented by practical examples. The document also outlines the role of the DAS in relation to this administrator's duty.
2. The *Bankruptcy Act 1966* sets out the legislative framework for an administrator's duty to notify the Official Receiver of six month arrears default. This framework provides a specific duty for an administrator to notify the Official Receiver in accordance with sections 185LC and 185QA and the [Legislative Instrument](#) in clauses 2.7.12 to 2.7.13.

## Practical meaning and elements of duty

### ***What constitutes a six months arrears default?***

3. A six month arrears default may occur in one of two ways:
  - (i) A debtor has made no payments for six months after a payment is due. Note this needs to be a continuous period of no payments for six months.
  - (ii) The debt agreement has continued for six months past the completion date and the debtor has not completed all payments and obligations.
4. Upon either (i) or (ii) above occurring the debt agreement will be in "six month arrears default." It is therefore an important duty of the administrator to notify the Official Receiver of this occurrence.
5. The six months arrears default occurs on the day immediately after the expiration of the six month period ie 6 months and one day. See practical examples below.

### ***How to measure "6 months"?***

6. The six month time period is not to be measured or converted to "days" or "weeks." The six month period is only to be measured in calendar months. See practical examples below.
7. In cases where the last day for making a payment in the six calendar months fall on a public holiday the six calendar month period is extended to the next working day.

### ***Notifying the Official Receiver***

8. Administrators are required to notify DAS within 10 working days of the default occurring. DAS will apply compliance checks to verify that default has occurred because it has such an important effect on the debtor's status. The DAS will decide if the six month arrears default has occurred and therefore the agreement terminated. If DAS

determine the agreement has terminated, they will notify the debtor, creditors and the administrator of the termination.

9. The debt agreement is terminated when the termination is recorded on the NPII. It is not backdated to the date the six month arrears default actually occurred.
10. Guidance in providing the detail that is to be included in the notification to DAS may be found from reference to the [Official Receiver's Practice Statement - Six months arrears default of a debt agreement](#). This Practice Statement is available on the ITSA internet.
11. Administrators are to use the [Notification of Six Month Arrears Default of Debt Agreement](#) form also available on the ITSA internet.

## **Practical examples**

### ***Example 1 - No payments for 6 months***

12. Mr X paid his \$100 weekly payment for the first 5 months of his debt agreement. Due to unemployment, Mr X stopped paying his weekly payment in June 2008 and the administrator was unable to locate him. The administrator referred to her records to discover that the last payment made by Mr X was on 8 June 2008. Therefore the last payment that was due but that remained unpaid was on 15 June 2008. The last day Mr X can make a payment to prevent the 6 month arrears default occurring is 15 December 2008. The six month arrears default occurred on 16 December 2008. The administrator carried out her duty to notify DAS of this occurrence within ten working days of 16 December 2008 – this was done on 22 December 2008. DAS records the termination on the NPII on 23 December 2008. The date shown on the NPII for the date of termination is 23 December 2008.

Note the relevant dates in this example are:

| <b>Date</b>                   | <b>Event</b>   |
|-------------------------------|--|
| 8 June 2008                   | Mr X makes his last payment  |
| 15 June 2008                  | Date last payment was due by Mr X  |
| 16 September 2008             | 3 month arrears default occurs (refer IGPD 17 for RDAA duty to notify creditors) |
| 15 December 2008 <sup>1</sup> | Last day Mr X can make a payment to prevent six month arrears default occurring  |
| 16 December 2008              | Six month arrears default occurs   |

<sup>1</sup> Note this date is **not** to be calculated from reference to **days** eg 6 months x 30 days in a month = 180 days after 15 June 2008 nor from reference to **weeks** eg 4.3 weeks in a month x 6 months = 26 weeks.

|                  |   |
|------------------|---|
| 22 December 2008 | RDAAs notified DAS within 10 working days   |
| 23 December 2008 | DAS records termination on the NPII – this is the date the debt agreement is terminated |

**Note:** Should Mr X make any payment between 15 June and 15 December 2008 inclusive, the counting of the six month default period will start again from the date that payment is made.

**Example 2 - 6 months after completion date**

13. Mrs Y regularly paid her instalments but is quite often paying slightly less than what was required. Over time this grew to 2 months in arrears and creditors have refused to approve variation proposals. The debt agreement is due to be completed on 21 August 2010. Six months after the completion date, (ie 21 February 2011), Mrs Y is still in arrears and all the payments and obligations of the debt agreement have not been met. This date, 21 February 2011, is the last day Mrs Y has to make all payments and complete all obligations in order to prevent six month arrears default occurring. The six month arrears default occurs on 22 February 2011. The administrator is expected to carry out his duty and notify DAS within ten working days of 21 February 2011 – the administrator does this on 28 February 2011. DAS records the termination on the NPII on 1 March 2011. The date shown on the NPII for the date of termination is 1 March 2011.

Note the relevant dates in this example are:

| <b>Date</b>                   | <b>Event</b>   |
|-------------------------------|--|
| 21 August 2010                | Completion date as shown on Debt Agreement Proposal  |
| 21 February 2011 <sup>2</sup> | Last day Mrs Y can make <b>all</b> payments to complete the debt agreement and prevent six month arrears default occurring |
| 22 February 2011              | Six month arrears default occurs   |
| 28 February 2011              | RDAAs notified DAS within 10 working days  |
| 1 March 2011                  | DAS records termination on the NPII – this is the date the debt agreement is terminated                                    |

14. The practical effect is to bring debt agreements to an end automatically if the debtor is significantly in arrears and it appears that they have no intention of completing the agreement. The debtor has the option when they fall significantly into arrears to propose a variation and inform creditors of their circumstances and why the debtor

<sup>2</sup> Note this date is **not** to be calculated from reference to **days** eg 6 months x 30 days in a month = 180 days after 21 August 2010 nor from reference to **weeks** eg 4.3 weeks in a month x 6 months = 26 weeks.

should be given more time to pay. There may be strong reasons such as a period of unemployment between jobs or expenses associated with the birth of a child. It is expected that administrators will take a leading role in working with debtors and creditors in times of default so all parties are aware of these alternatives to address the situation in the most appropriate manner.

15. It is in the spirit of the legislation that creditors are kept informed of all material developments with respect to an administration. In essence, administrators are facilitating the contract between the debtor and creditors and must not show bias to either party or their own interests.

## **Consequences if administrators breach this duty**

### ***National Personal Insolvency Index and creditors***

16. An administrator failing to advise DAS of six months arrears default leads to a delay in recording the correct position on the NPII thus adversely affecting the integrity of the personal insolvency system. It is also a likely indicator that creditors are not being kept informed as to the progress of an administration.

### ***Administrators***

17. Bankruptcy Regulation (BR) will monitor closely that this duty is carried out appropriately. Breaches identified will be required to be rectified immediately. Systemic breaches, especially after BR intervention, may lead to one of the remedial alternatives listed in [Inspector-General Practice Statement 9](#) at paragraph 11 being undertaken. This includes disciplinary action.

## **ITSA Roles**

### ***Bankruptcy Regulation***

18. Section 12 provides BR with the power to investigate where there are issues of concern either during the annual inspection program or through a complaint being made. BR will examine the level and thoroughness of the six month arrears duty being performed by reference to the principles in this Practice Direction and the Legislative framework outlined in paragraph 2 above.
19. Where breaches of this duty or a lack of record keeping are identified an administrator will be asked to take appropriate remedial action including a change in practice. This may also lead to counselling or in serious or systemic cases to either litigation or disciplinary action being initiated including conditions being placed on an administrator's registration.
20. During annual inspections, BR will examine the systems and controls an administrator has in place in respect to:
  - (i) the system that will enable accurate identification of six month arrears default; and

(ii) processes that will ensure they notify DAS of the six month arrears default within 10 working days.

21. BR will examine documented practices and check lists, delegations and, where an administrator is relying on others to assist, how the administrator properly supervises and train their employees, agents or brokers to properly perform these duties on their behalf.

### ***Debt Agreement Service***

22. DAS checks that the administrator has given the notification in the form required and that it is accurately completed. It then records the termination on the NPII and notifies the debtor, creditors and administrator.
23. If there is doubt or dispute about whether default has occurred, DAS will make a compliance telephone call to the debtor, creditor and/or administrator to verify the situation. Further information such as a status report may be requested.
24. If DAS believes an adequate process has not been followed they will contact BR to ensure appropriate remedial action is undertaken.

### **Conclusion**

25. This Practice Direction outlines the Inspector-General position on some of the vexed questions relating to an administrator's duty to notify DAS of a six month arrears default. It will be against these principles and the Legislative framework that an administrator's performance of this duty will be assessed by BR.